**STATE OF MICHIGAN**
**IN THE MICHIGAN SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**,

Plaintiff-Appellee,

Supreme Court No. _____
Court of Appeals No. 338431
Lower Court No. 05-000220-FH

vs.

**TERRY LEE CEASOR,**

Defendant-Appellant.

# DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

**MICHIGAN INNOCENCE CLINIC**
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## JUDGMENT APPEALED FROM

Defendant-Appellant Terry Ceasor appeals from the May 23, 2019, Michigan Court of Appeals Opinion affirming his conviction for first-degree child abuse. Court of Appeals Opinion, Appendix A.

## QUESTION PRESENTED FOR REVIEW

The Court of Appeals concluded that trial counsel—who had already found an expert favorable to the defense in this Shaken Baby Syndrome case—was not ineffective in failing to request funds from the trial court to retain the favorable expert because: a) counsel believed, erroneously, that he could not ask for funds in a case where he had been retained, as opposed to court-appointed, b) the trial court might have refused to provide adequate funds, and c) counsel cross-examined the State's expert. With that background, the question presented for review is:

I. Should this Court reverse and remand for a new trial because the Court of Appeals' decision here conflicts with:

   a. this Court's decision in *People v Ackley* and the Court of Appeals' own published decision in *In re Yarbrough Minors* (regarding duties of counsel trying a contested Shaken Baby Syndrome case),
   b. the United States Supreme Court's decision in *Hinton v Alabama* (regarding duty of counsel to understand the law pertaining to allowable funding for experts), and
   c. the Court of Appeals' published decision in *People v Arquette*, (holding that a defendant with a retained lawyer may still be entitled to court funds)?

      Defendant-Appellant Answers: "Yes."

      The Court of Appeals Would Answer: "No."

      The Trial Court Would Answer: "No."

## INTRODUCTION TO THE CASE AND GROUNDS FOR APPEAL

In 2004, Mr. Ceasor's girlfriend's young son suffered a head injury, from which he quickly and fully recovered. The prosecution's theory was that Mr. Ceasor violently shook the toddler, while Mr. Ceasor has always maintained that the child fell off a couch and hit his head on the floor.

Mr. Ceasor's 2005 conviction for first-degree child abuse rested exclusively on the type of expert testimony about Shaken Baby Syndrome (SBS) that this Court unanimously recognized had been called into doubt by recent scientific developments. *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015). Mr. Ceasor's retained trial counsel (who was paid by Mr. Ceasor's mother) repeatedly acknowledged that he needed an expert to counter the prosecution's SBS expert. In fact, trial counsel found a favorable expert who was prepared to testify that the toddler's symptoms were entirely consistent with the accidental short fall Mr. Ceasor described. Court of Appeals Opinion at 3, 4 (Appendix A).

But as trial counsel acknowledged, Mr. Ceasor did not have enough money to pay the expert. Trial Court Opinion at 12 (Appendix B). At a subsequent *Ginther* hearing, trial counsel admitted that he believed, erroneously, that he could not ask the trial court for expert funds because he had been retained by Mr. Ceasor's mother (as opposed to being court-appointed). Thus, trial counsel never advised Mr. Ceasor of the option of seeking funding from the trial court. Mr. Ceasor believed the only way to retain his defense expert was to try to come up with the money himself. He tried to do this until shortly before trial, but was unsuccessful. Mr. Ceasor thus believed that his only option was to go to trial without a defense expert, and that is what happened.

Even without hearing from a defense expert, the jury struggled with its decision—repeatedly asking to review the testimony of the prosecution's expert, and at one point declaring itself deadlocked—before eventually finding Mr. Ceasor guilty.

This Court should grant leave to appeal or summarily reverse and order a new trial for

several reasons. First, it is well-established that a conviction in a contested SBS case cannot stand if, as here, the jury heard only one side of the medical controversy surrounding the SBS diagnosis. *See People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015); *see also In re Yarbrough Minors,* 314 Mich App 111; 885 NW2d 878 (2016) (applying *Ackley* to parental termination case). But the Court of Appeals held that *Ackley* was distinguishable (and it did not even mention *Yarbrough*) because counsel challenged the SBS diagnosis in cross-examination and presented Mr. Ceasor's short-fall defense in argument to the jury. Court of Appeals Opinion at 7. That holding cannot be squared with *Ackley* or *Yarbrough*, which specifically held that cross-examination of the State's expert and argument are not sufficient substitutes for a defense expert. 314 Mich App at 132-33.

Second, the Court of Appeals failed to recognize that defense counsel's reason for not presenting an expert stemmed from a clear misunderstanding of the law. Counsel admitted during the *Ginther* hearing that he did not request expert funds from the court because he believed a defendant with retained counsel could not make such a request. Counsel was plainly wrong as a matter of law. *See People v Arquette*, 202 Mich App 227; 507 NW2d 824 (1993) (holding that indigent defendant with retained counsel paid for by relatives could still be indigent for purposes of other litigation costs). Basing a crucial strategic decision on a misunderstanding of the law is *per se* deficient performance; the Court of Appeals nevertheless held that counsel could not be faulted for failing to make a "novel" argument for expert funds. Court of Appeal Opinion at 10.[1]

Third, the Court of Appeals concluded that there was no prejudice from trial counsel's failure to ask for funds for an expert because the trial court likely would not have provided enough

[1] The Court of Appeals even questioned whether Mr. Ceasor, who was a single father with an income of $17,000 in 2005, was actually indigent for the purposes of retaining an expert who would have charged thousands to testify at trial. This speculation contradicts the record. Extensive evidence of Mr. Ceasor's poverty was presented at the *Ginther* hearing, and the trial court noted "[Trial counsel] did not quarrel with Defendant's evidence and believed in 2005 Defendant did not have funds of his own to hire an expert." Trial Court Opinion, 2/1/2018 (Appendix B) at 12.

funds to retain the expert in question. Court of Appeals Opinion at 10. That holding violates the U.S. Supreme Court's decision in *Hinton v Alabama*, 571 US 263; 134 S Ct 1081, 1088-89; 188 L Ed 1 (2014)—which recognized that an indigent defendant is entitled to funding adequate to hire a competent expert, and counsel is ineffective if he fails to ask for that funding. **The Supreme Court has thus established the reasonable principle that trial counsel cannot decline to file meritorious motions just because he guesses the judge will violate the law and deny them.**

Therefore, the Court of Appeals' decision conflicts with several published decisions of that court, this Court, and the U.S. Supreme Court, MCR 7.305(B)(5)(b), and it will cause manifest injustice to Mr. Ceasor, who is clearly entitled to a new trial under *Ackley.* MCR 7.305(B)(5)(a). This Court should grant leave to appeal or summarily reverse the Court of Appeals' decision and remand for a new trial.

## STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

### 1. Brenden's Injury

On Sunday, October 3, 2004, Terry Ceasor babysat his girlfriend Cheryl Genna's 16-month-old son, Brenden, while she went swimming with her daughter. Trial Transcript (TT) at 220-21. It is undisputed that Mr. Ceasor had a good relationship with Brenden and had always participated in his care. TT 216-17, 262-64, 267-70. Brenden and Mr. Ceasor played a game where Brenden ran back and forth on the sofa while Mr. Ceasor "chased him" behind it. TT 382, 529-31. Following a period of playing, Mr. Ceasor stepped out of the living room to use the bathroom, keeping the door open, and he then heard a loud thud. TT 383, 403, 533-34. He ran back into the living room and found Brenden on the floor, unconscious. TT 293, 403-04, 533-35.

Moments later, Ms. Genna returned from the pool with her daughter. TT 222, 534-35. Mr. Ceasor and Ms. Genna immediately rushed Brenden to Port Huron Hospital. TT 222-223, 268-69,

535. At no time did Ms. Genna suspect that Mr. Ceasor intentionally injured Brenden, nor did she report any suspicion to the police officers who interviewed her. TT 288, 292-294.

**2. Brenden's Treatment and Recovery**

Upon admission to Port Huron Hospital, Brenden was unresponsive to stimulus. TT 310. Nurse LeAnn Roulo examined Brenden and observed no bruising anywhere on his head, nor did she find any scrapes, bruising, or abnormalities on the rest of his body. TT 320-21. She did note that one of Brenden's pupils was "vastly larger than the other," a neurological indicator that prompted the hospital staff to order a CAT scan. TT 312. According to Nurse Roulo, Mr. Ceasor was upset and crying. TT 344. Mr. Ceasor paced in front of Brenden's bed in an emotional state, asking whether Brenden would be okay. TT 291, 319, 332-33.

Dr. Christopher Hunt, the emergency room physician who treated Brenden, found his vital signs were stable and that he was breathing regularly. TT 351. He also observed that Brenden was unresponsive to stimuli and that his pupils were of unequal size. TT 351. Dr. Hunt did not see any external signs of trauma. TT 351, 362-63.

By the time the CAT scan was taken, approximately one hour after Brenden arrived at Port Huron Hospital, he was alert and his pupils were equal and reactive. TT 3 14, 343. Shortly thereafter, he was crying, and his breathing was even and unlabored. TT 366-67.

Brenden's CAT scan showed a subdural hematoma with a slight mass effect. TT 355. Dr. Hunt testified that a mass effect occurs when the blood under the dura in the brain is of such quantity that it begins to push the brain to the opposite side. TT 355. He considered the subdural hematoma a serious condition and decided to send Brenden to Children's Hospital in Detroit to consult with a pediatric neurosurgeon. TT 356.

Brenden was transferred by ambulance that night to Children's Hospital in Detroit. TT 228, 356. Mr. Ceasor asked to go to the Children's Hospital with Ms. Genna and Brenden. Detective

Terry Baker instead asked Mr. Ceasor to take him to his house to investigate and photograph the scene of the incident. TT 387.

Dr. Holly Gilmer-Hill was one of the neurosurgeons who evaluated Brenden at Children's Hospital. She found that Brenden was awake, alert, and had no external bruising, scalp swelling, or other outward signs of trauma. TT 447. She reviewed the CAT scan from Port Huron Hospital, which showed some blood, brain-swelling, and a midline shift—which to her indicated a "serious" injury. TT 448. Dr. Gilmer-Hill noted no other injuries, and the radiology showed no fractures. However, the Children's Hospital progress notes and diagram showed bruising to the forehead. TT 457, 470-72.

Ms. Genna noticed a bite mark on Brenden's tongue while he was at Port Huron Hospital. TT at 248-49. She and other family members also noted a red mark "about the size of a 50 cent piece" on Brenden's head after he was taken to Children's Hospital. TT 232-33, 248.

Dr. Gilmer-Hill did not remember noticing any retinal hemorrhaging on October 3, the date of Brenden's admission. TT 486. On October 5, an ophthalmologist reportedly noticed some retinal hemorrhaging in both of Brenden's eyes. TT 452, 489.

Brenden did not require neurosurgical intervention and recovered fully; he was discharged on October 8 with no lasting injuries. TT 455, 255-56.

**3. Trial Counsel's Failure to Retain A Defense Expert for Trial**

Mr. Ceasor's mother retained Attorney David Black for her son's preliminary exam. Evidentiary Hearing ("EH") 9/21/17 at 41. After prosecution expert Dr. Gilmer-Hill testified at the preliminary exam, Mr. Black told the district judge, "I know this case is going to get bound over and so does my client, but there's no eyewitnesses to it. **It's going to be expert against expert**, and that's why it's very, very important that I get all the information I can when I have an opportunity to talk to witnesses." Preliminary Exam (PE) 1/25/05 at 57 (emphasis added).

For the trial, Mr. Ceasor's mother again paid to retain an attorney, Kenneth Lord, EH 41, who did not retain an expert. Consequently, only the prosecution's expert, Dr. Gilmer-Hill, testified about the cause of Brenden's injuries at the trial.

Mr. Ceasor's mother had paid for his attorney both at the preliminary exam (Mr. Black) and at trial (Mr. Lord) because he did not have money to hire an attorney. EH 17-18. Both Mr. Black and Mr. Lord informed Mr. Ceasor that a defense expert was necessary. EH 18-19, 62. Indeed, **Mr. Lord testified at the 2017 hearing that a defense expert was "absolutely" necessary**. EH 62.

Before trial, Mr. Lord informed Mr. Ceasor that he had contacted Dr. Faris Bandak, and that Dr. Bandak was owed fees, which Mr. Ceasor recalled being $1,500, for his initial review of the case. EH 19, 63-64. Dr. Bandak's eventual costs for testifying on Mr. Ceasor's behalf would be thousands of dollars more. EH 19, 64

Mr. Ceasor could not afford the $1,500 for Dr. Bandak's initial review—much less the additional costs for his testimony. EH 19. Trial counsel, Mr. Lord, was aware "that Mr. Ceasor himself was too poor to have the money" for an expert, and that "he didn't want to put his mother in any further debt." EH 78.

Mr. Lord admitted that he did not ask the trial court to provide funding for a defense expert, despite Mr. Ceasor's indigence. EH 64-65. As Mr. Lord explained at the 2017 evidentiary hearing, when Mr. Ceasor told him he could not come up with the money to hire an expert, Mr. Lord did not ask the court for expert witness fees because the motion cut-off date had passed, **and because he did not realize that a judge could grant expert witness fees in a case where the defendant had a retained lawyer**. EH 78-80.

Since Mr. Ceasor was unable to pay either the initial fee trial counsel had already expended on Dr. Bandak or more fees for expert testimony at trial, Mr. Lord never retained an expert for Mr.

Ceasor's trial. During jury selection, Mr. Lord repeatedly told the jury that Mr. Ceasor would not have an expert witness solely because he could not afford one:

> MR. LORD: . . . Mr. Sams [juror], do you think that money can sometimes assist a person? **If we have a lot of money to hire expert witnesses and you're wealthy and you bring a bunch of people in here to counteract their experts, that would help, wouldn't it?**
>
> JUROR SIX: Probably would.
>
> MR. LORD: **What if you don't have a lot of money?**
>
> ***
>
> MR. LORD: . . . .And we talked a little bit about money. **My client cannot afford to hire an expert.** I can tell you that right now.
>
> ****
>
> **But we can't afford to hire an expert,** you understand that? **Not everybody has that kind of money available.**

TT 79, 91, 153 (emphasis added).

**4. The Prosecution's Expert Testimony at Trial**

Dr. Gilmer-Hill testified at trial that Shaken Baby Syndrome is the violent shaking of a child, generally under two years old, causing the brain to slam back and forth and a bridging vein to tear, causing a subdural hematoma. TT 434. According to Dr. Gilmer-Hill, SBS is most common in children two years and under who cannot support their heads. *Id.* She told the jury that retinal hemorrhage is a sign of an impact, such as being struck, slammed down on a sofa or soft surface, or thrown against a wall or up against a ceiling. *Id.* She said that bruising might not be present in typical SBS cases but fractures frequently are, often in varying stages of healing. TT 436. She admitted that Brenden had no fractures. TT 457. Dr. Gilmer-Hill testified that a nurse's note indicated bruising on Brenden's forehead, which would have been consistent with a fall from the sofa to the coffee table or the floor but said that she did not see any bruising. TT 469-472. She also did not find any other external bruising in her examination of Brenden, suggesting to her that he

must have been violently shaken. TT 436, 447.

Dr. Gilmer-Hill testified that although she was not an expert in biomechanics, she disagreed with a 2001 study based on data from the Consumer Safety Commission published by forensic pathologist Dr. John Plunkett. John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 4 AM. J. FOR. MED. PATH 24, Dec. 2003; TT 473. She admitted that Dr. Plunkett's study found that a fall from two to three feet can kill a small child, but she said this finding disagrees with the body of evidence. TT 480.

Dr. Gilmer-Hill testified that a fall from five to six feet produces much less force than shaking. She claimed her opinion was supported by studies done by Ann-Christine Duhaime. TT 478-479. Dr. Gilmer-Hill further testified that subdural hemorrhage, brain-swelling, and midline shift are only seen in accidents such as falls from two-story buildings or high-speed motor vehicle accidents and cannot be caused by an accidental injury such as a fall from a couch onto a carpeted floor. TT 455-456.

Dr. Gilmer-Hill placed particular emphasis on the ophthalmology exams she reviewed on October 6 that showed retinal hemorrhaging. TT 452. She testified that it takes a great deal of force to cause retinal hemorrhages and the only possible cause is being shaken or slammed on hard or soft surfaces, usually repeatedly. TT 453. She admitted that she did not herself notice any retinal hemorrhaging when she examined Brenden. TT 487-489.

**5. Other Trial Testimony**

Other than Dr. Gilmer-Hill's unrebutted expert testimony, the prosecution presented no evidence of child abuse. As described above at page 5-6, Cheryl Genna testified that she had no reason to suspect Mr. Ceasor of abusing Brenden. The prosecution presented police testimony to establish that Mr. Ceasor and Ms. Genna at first falsely claimed that Ms. Genna was present when Brenden fell, TT 288, 382-383, but they both subsequently admitted that Ms. Genna had arrived

back at the home shortly after the accident. TT 403-404. Ms. Genna admitted in trial testimony that *she*, not Mr. Ceasor, was the one who came up with the false claim that she was present when Brenden fell and that *she* was the one who encouraged Mr. Ceasor to go along. TT 229-230, 253. The police detective who interviewed Mr. Ceasor repeatedly confirmed that "everything else stayed the same" in Mr. Ceasor's account other than whether Ms. Genna had arrived back at the time of the fall. TT 403-404.

Mr. Ceasor testified in his own defense and described, as he had to the police before, playing the chasing game with Brenden on the couch, leaving Brenden on the couch when he went to the bathroom, and then hearing a thud and rushing back into the living room where he found Brenden unconscious on the floor. TT 529-534. Ms. Genna arrived back very shortly after the fall, and they rushed Brenden to the hospital. TT 534-535. Mr. Ceasor denied shaking or abusing Brenden in any way. TT 547.

**6. Jury Deliberations**

The jury began deliberating on December 15, 2005. On December 16, the jury asked to hear Dr. Gilmer-Hill's testimony again in its entirety. TT 650-651. The jury deliberated the rest of the day and resumed deliberations on December 17. TT 734-735. Then the jury asked to hear a specific portion of Dr. Gilmer-Hill's testimony. TT 738. Later that day, the jury announced it could not reach a unanimous verdict. TT 765. The court read a deadlocked jury instruction, and, after further deliberation, the jury returned a guilty verdict. TT 767-768. Mr. Ceasor was convicted of first-degree child abuse and sentenced to 2-15 years in prison.

**7. First Appeal of Right (No. 268150)**

Mr. Ceasor appealed his conviction by right, claiming that his trial lawyer was ineffective for failing to obtain a defense expert to rebut the prosecution's only evidence of guilt. However, appellate counsel did not file a motion to remand for a *Ginther* hearing, as required by MCR 7.211,

and instead made only a passing reference in the appellate brief to the idea of remanding the case for an evidentiary hearing.

Given appellate counsel's failure to file the required motion to remand to obtain a *Ginther* hearing on the ineffective assistance claim, the Court of Appeals concluded that its "review [was] limited to errors apparent on the record." *People v Ceasor*, No. 268150 at *4 (Mich App July 12, 2007). Because the record was devoid of any facts relating to defense counsel's failure to hire an expert, the Court of Appeals applied "the presumption that counsel's decision to not call an expert witness was a matter of sound trial strategy" and found that Mr. Ceasor could not "overcome the presumption that defense counsel declined to present an expert witness because any expert consulted was unwilling to support defendant's position that the injury was accidental or would not have presented favorable testimony after reviewing the evidence." *Id.* at 10.

**8. Procedural History Resulting in a New Direct Appeal of Right**

Represented by the Michigan Innocence Clinic, Mr. Ceasor filed a motion for relief from judgment in the St. Clair County Circuit Court on May 25, 2010. That motion raised a single claim: that *appellate* counsel was constitutionally ineffective in failing to file a motion to remand to obtain the evidentiary hearing that was necessary to establish Mr. Ceasor's ineffective assistance of trial counsel claim on direct appeal. Mr. Ceasor requested an evidentiary hearing on his ineffective assistance of appellate counsel claim, and he attached affidavits from, among others, four distinguished medical experts who agreed that Brenden very likely suffered a short fall and would have been willing to testify to that effect at trial in 2005 (Medical Expert Affidavits, Appendix C).

On May 11, 2011, the trial court denied Mr. Ceasor's motion, finding that "[the] issue ha[d] already been decided in a prior appeal" and was therefore barred by MCR 6.508(D)(2). On October 4, 2011, the Court of Appeals denied Mr. Ceasor's application for leave to appeal. *People v Ceasor*, No. 304703 (Mich App Oct 4, 2011), and this Court denied leave to appeal on April 23, 2012.

*People v Ceasor*, 491 Mich 908; 810 NW2d 578 (2012).

Mr. Ceasor then pursued habeas corpus relief in federal court. After the district court denied the habeas petition, the Sixth Circuit ordered an evidentiary hearing on Mr. Ceasor's ineffective assistance of appellate counsel claim, "[b]ased on the strength of Ceasor's ineffective assistance of trial counsel claim." *Ceasor v Ocwieja*, 655 Fed App'x 263, 289 (CA 6 2016). The Sixth Circuit determined that because trial counsel failed to obtain an expert, he "lacked the ability to refute Dr. Gilmer-Hill's allegedly erroneous assertions about causation, the biomechanics of short falls, and the etiology of Brenden's subdural hematoma and retinal hemorrhaging." *Id.* at 283. Moreover, the Sixth Circuit pointed out that trial counsel had not sought funding for an expert witness under MCL 775.15. *Id.* at 285.

On May 12, 2017, the federal district court issued a Stipulated Order granting habeas relief to Mr. Ceasor. *Ceasor v Ocwieja*, No. 5:08-cv 13641 (May 12, 2017) (Appendix D). The federal court ordered the Michigan Court of Appeals to grant Mr. Ceasor a new direct appeal of right because he had received ineffective assistance of appellate counsel during his original direct appeal. Specifically, the district court order recognized that "the parties stipulate that appellate counsel's deficient performance prejudiced [Mr. Ceasor] because appellate counsel failed to litigate in state court a claim of ineffective assistance of trial counsel that was reasonably likely to succeed." *Id.*

On May 19, 2017, the Michigan Court of Appeals accordingly opened a new direct appeal, Docket No. 338431. On July 12, 2017, Mr. Ceasor filed a Motion for New Trial, pursuant to MCR 7.208(B), in the St. Clair County Circuit Court based on an ineffective assistance of trial counsel claim for his trial counsel's failure to seek funds from the court to hire an expert witness or to otherwise obtain and present a defense expert witness. Mr. Ceasor attached to his Motion for New Trial the same four affidavits from experts (Drs. Stephens, Plunkett, Uscinski, and Van Ee) that he

had attached to his 2010 Motion for Relief from Judgment. Those same four affidavits are attached as Appendix C to this Application.

**9. The 2017 Evidentiary Hearing in the Trial Court**

On August 7, 2017, Judge Michael West, the successor St. Clair County circuit judge, held a hearing to decide whether to allow testimony to be taken at the evidentiary hearing. Judge West began by suggesting that trial counsel could not be ineffective for failing to seek funding from the court for an expert witness because expert witness fees would not be available to a client with a retained attorney. EH 8/7/17 at 6. The prosecution also argued that Judge Adair, Mr. Ceasor's trial judge, would not have granted counsel's motion for court funds. *Id.* at 15. Judge West appeared to agree, stating that, had he made such a motion when he was a practicing lawyer, "I'd probably get laughed out of the courtroom. I would be very surprised knowing Judge Adair that he would grant that request and then if he did, my expectation would be that if an amount of funds were appropriated it would probably be a rather meager amount of money." *Id.* at 24-25. Mr. Ceasor argued that trial counsel was ineffective in failing to seek funds for an expert. *Id.* at 5-8, 26.

During the first day of the hearing, Judge West indicated that he did not need Mr. Ceasor's expert witnesses to testify, because he expected they would testify "consistently with their affidavits. I don't expect that they're going to come in and tell me anything different than what they have already submitted by way of their written statement." *Id.* at 23. At the conclusion of the first day, Judge West declared he would soon issue an order regarding the scope of the hearing, and he again indicated that he did not believe it would be necessary to hear from the experts who had submitted affidavits on Mr. Ceasor's behalf. *Id.* at 28-29.

On August 30, 2017, Judge West issued an order for an evidentiary hearing solely to establish "additional facts . . . regarding the nature and extent of Defendant's retained attorney-client relationship and specifically the issue of Defendant's alleged indigence." Trial Court Order,

8/30/17, at 1-2 (Appendix E).

In accordance with this order, an evidentiary hearing was held on September 21, 2017, limited to issues relating to Mr. Ceasor's indigence at the time of trial. The defense called four witnesses: Terry Ceasor, Alan Hastings, Diana Hastings, and Kenneth Lord.

Terry Ceasor testified, using his Social Security statement, that he earned $15,107 in 2005. EH 9/21/17 at 11. He testified that he did not personally retain Mr. Black or Mr. Lord because he had no money to do so. *Id.* at 17-18. He similarly lacked the money to retain Dr. Bandak as an expert for his trial. *Id.* at 19. Mr. Ceasor testified that Mr. Black and Mr. Lord both emphasized to him the importance of a defense expert in his case. EH 18, 20. Had he been able to afford an expert, Mr. Ceasor would have retained an expert rather than going to trial without one. *Id.* at 20.

Diana Hastings, Mr. Ceasor's mother, testified that she paid to retain both Mr. Black and Mr. Lord for $1,000 and $2,500 respectively. *Id.* at 41-42. Alan Hastings, Mr. Ceasor's uncle, who employed Mr. Ceasor at his body shop, was present during several of Mr. Ceasor's meetings with Mr. Lord, and recalled him emphasizing the importance of retaining a defense expert. *Id.* at 49, 51. Mr. Hastings also testified that Mr. Lord told Mr. Ceasor that an expert could cost up to $10,000 for the trial. *Id.* at 51.

Mr. Ceasor's trial attorney Kenneth Lord testified that he agreed "absolutely" that an expert was essential to the defense. *Id.* at 62. Mr. Lord acknowledged that the expert he originally consulted, Dr. Bandak, had an initial fee of $750. *Id.* at 63. Mr. Lord expected the total expert expenses at trial would have been $1,500 per day, or roughly $3,000 total. *Id.* at 71. He also testified that Dr. Bandak was willing to work with him to negotiate a rate for Mr. Ceasor. *Id.* at 73. Indeed, due to his interest in Mr. Ceasor's case, Dr. Bandak continued to consult with Mr. Lord even though Mr. Ceasor had not paid the initial consultancy fee for the doctor. *Id.*

Mr. Lord was aware that Mr. Ceasor did not have the money to pay for an expert, but he

thought that Mr. Ceasor was working to raise the funds. *Id.* at 75, 78 ("I knew that Mr. Ceasor himself was too poor to have the money."). About two weeks before trial, Mr. Ceasor informed Mr. Lord that he would not be able to come up with funds for an expert. *Id.* at 78. By this time, the trial court's pre-trial motion date had passed, and Mr. Lord did not feel comfortable asking for a continuance. *Id.* at 77-78. He did not want to ruffle feathers by asking for more time, or filing a motion for expert funds. *Id.* at 76.

Mr. Lord was aware, however, that Mr. Ceasor did not have the money to hire an expert and would have met the standards of indigence. *Id.* at 78, 80. Mr. Lord further testified that he had never requested money for an expert on behalf of a client who had retained his services and gave no indication that he had researched the issue. *Id.* at 80, 94-95.

**10. The Trial Court's Opinion Denying a New Trial**

Judge West issued an opinion denying Mr. Ceasor's Motion for New Trial on February l, 2018 (Appendix B). He found that "Mr. Lord did not quarrel with Defendant's evidence and believed in 2005 Defendant did not have funds of his own to hire an expert." Trial Court Opinion at 12 (Appendix B). Further, Judge West acknowledged that "trial counsel recognized the importance of a defense expert." *Id.* at 13. Indeed, the judge found that, had the case gone to trial today, "the decision in *People v Ackely* [sic] . . . could likely require a finding of ineffective assistance of trial counsel." *Id.* at 15.

But Judge West ruled that a "perception still exists" that a retained attorney cannot ask for public funding and that, therefore, "it is not unreasonable for retained defense counsel to believe they would not be successful in obtaining public funds to retain a defense expert even if the client's indigency [sic] could be established." *Id.* at 14. Therefore, Judge West denied a new trial.

**11. The 2019 Court of Appeals Opinion (No. 338431)**

On May 23, 2019, the Court of Appeals rejected the ineffective assistance claim and

affirmed Mr. Ceasor's conviction. Court of Appeals Opinion (Appendix A). In reaching that conclusion:

(1) The panel held that trial counsel cannot be faulted for failing to advise Mr. Ceasor of the option of seeking court funding for an expert or actually requesting funding for an expert because counsel cannot be expected to make a "novel" argument that a defendant represented by retained counsel is eligible for funding for other costs of litigation. Court of Appeals Opinion at 10. The Court of Appeals ignored its own published opinion in *People v Arquette*, 202 Mich App 227; 507 NW2d 824 (1993), which made clear this argument would not have been novel at all: *Arquette* held that a defendant represented by retained counsel (paid for by another) is nonetheless eligible to seek funding for other litigation costs if he cannot afford to pay them.[2]

(2) The panel held that Mr. Ceasor was not prejudiced by trial counsel's failure to ask for funds for an expert because the trial court likely would have denied the motion or failed to provide enough money to hire an expert (Court of Appeals Opinion at 10), but failed to recognize that if the motion had been denied, then Mr. Ceasor would have had a winning argument that the trial court committed error. The panel also failed to acknowledge *Hinton v Alabama*, 571 US 263; 134 S Ct 1081, 1088-89; 188 L Ed 1 (2014), which held that trial counsel was ineffective in failing to ask for funds to hire an adequate expert, without requiring a showing that the motion would have been granted.

(3) The panel held that Mr. Ceasor was not prejudiced by the absence of a defense expert, even though his trial attorney testified that a defense expert was "absolutely" necessary, because his trial attorney cross-examined the State's expert and presented Mr. Ceasor's defense in closing argument. Court of Appeals Opinion at 7. But this holding undermines *Ackley* and is

[2] The panel only cited *Arquette* for a different proposition earlier in the opinion.

contrary to the Court of Appeals' published opinion in *Yarbrough* (never cited by the panel), which held that cross-examination of an expert "steeped in years of medical training, knowledge, and experience" is insufficient as a replacement for a defense expert when a legitimate medical controversy exists. 314 Mich App 132-33. Indeed, the panel's opinion contradicts the prior opinion of the Sixth Circuit in this very case, which had found counsel's cross-examination to be weak and inadequate: "[A]lthough trial counsel attempted to undermine [the State's expert's] credibility by highlighting some of the weaknesses affecting her opinion, he lacked the ability to proffer evidence contradicting her opinions." *Ceasor v Ocwieja*, 665 F App'x 263, 283 (CA 6 2016).

Mr. Ceasor now seeks summary reversal or, in the alternative, leave to appeal.

## ARGUMENT

### I. This Court Should Grant Leave To Appeal Or Summarily Reverse Because Trial Counsel Was Constitutionally Ineffective For Failing To Request Funds For An Expert Witness In A Shaken Baby Case Where Counsel Admitted An Expert Was "Absolutely" Necessary And He Knew His Client Could Not Afford An Expert: Counsel Erroneously Believed That A Defendant With Retained Counsel Was Ineligible For Such Funding; And The Court Of Appeals Opinion Below Conflicts With *Ackley*, Two Published Court Of Appeals Opinions, And A United States Supreme Court Opinion.

#### *Standard of Review and Issue Preservation*

Mr. Ceasor preserved his ineffective assistance of trial counsel claim by filing a motion for new trial in the trial court, holding a *Ginther* hearing in the trial court, and litigating that claim in the Court of Appeals.

A trial court's decision denying a new trial is reviewed for abuse of discretion. *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008) (citation omitted). Appellate courts "examine the reasons given by the trial court. . . . Where the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion." *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997) (citation omitted).

Findings of facts are reviewed for clear error, but questions of law require de novo review. *Unger*, 278 Mich App at 242. Whether a defendant has been denied effective assistance of counsel is "a mixed question of fact and constitutional law." *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Thus, trial court findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

#### *Introduction and Summary of Argument*

A defendant receives ineffective assistance of counsel, in violation of the Sixth

Amendment, when his attorney engages in deficient performance which results in prejudice to the defendant. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Knowing that an expert was "absolutely" necessary to Mr. Ceasor's defense, EH 9/21/2017 at 62, and knowing that Mr. Ceasor did not have enough money to pay for an expert, an objectively reasonable attorney would have filed a motion to request funds from the trial court. As the U.S. Supreme Court has held, trial counsel is ineffective in failing to ask the trial court for funds to obtain a competent expert in a case such as this when there is no dispute that expert testimony is critical to the outcome. *Hinton v Alabama*, 571 US 263; 134 S Ct 1081, 1088-89; 188 L Ed 1 (2014). But trial counsel never filed such a motion and instead went to trial without an expert in a Shaken Baby Syndrome (SBS) case—the exact type of case where this Court has recognized that a defense expert is critical for a fair trial. *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015). And as counsel admitted, the reason that he failed to ask for funds for an expert was based on a legally erroneous belief that a defendant with retained counsel is ineligible for funding. *See People v Arquette*, 202 Mich App 227; 507 NW2d 824 (1993) (holding that when, as here, retained counsel is paid for by someone else, a defendant still may be entitled to court funding for other necessary litigation costs).

Mr. Ceasor's trial counsel therefore performed in a constitutionally deficient manner, **as at least three justices of this Court previously recognized in citing to Mr. Ceasor's case in a dissenting opinion in *People v Roberts***, 503 Mich 895; 919 NW2d 275 (2018) (Zahra, J., dissenting) (citing *Ceasor v Ocwieja*, 665 F App'x 263, 285 (CA 6 2016), as a case where deficient performance was established).

That deficient performance prejudiced Mr. Ceasor, because it left the prosecution's expert evidence unrebutted. Given that the jury had great difficulty deciding this case, the undisputed fact that trial counsel had located a distinguished expert who was prepared to testify favorably for

the defense, Court of Appeals Opinion at 3, 4, easily establishes prejudice in this case.

The Court of Appeals' conclusion—that there was no prejudice because the trial court might have denied a motion for adequate funding—flies in the face of *Arquette* and *Hinton* and overlooks the fact that such a denial would have given Mr. Ceasor a winning argument for a new trial on appeal. *Hinton* makes clear that trial counsel cannot decline to file meritorious motions just because he guesses the judge will violate the law by denying them. And the Court of Appeals' conclusion that there was no prejudice because trial counsel performed adequately in cross-examining the State's expert undermines the holding of *Ackley*, squarely conflicts with *Yarbrough*, 314 Mich App at 132-33, and conflicts also with the Sixth Circuit's opinion in this very case about the adequacy and competence of counsel's cross-examination. *Ceasor*, 665 F App'x at 283.

### A. Trial Counsel Performed Deficiently In Failing To Request Expert Funds Based On A Mistaken Legal Belief, Contrary To *People v Arquette*, That A Defendant With Retained Counsel Cannot Obtain Such Funding.

#### *1. There is no dispute that an expert was necessary here for an adequate defense.*

As the trial court concluded after the evidentiary hearing, "[t]he importance of a defense expert is not disputed." Trial Court Opinion at 12 (Appendix B). Mr. Ceasor's first attorney told the district court during the preliminary hearing that the case would be "expert against expert" due to the highly technical nature of SBS cases. PE at 57. Kenneth Lord, Mr. Ceasor's trial attorney, agreed at the 2017 evidentiary hearing that an expert was "absolutely" required to defend the case. EH 9/21/17 at 62. Mr. Ceasor also testified at that evidentiary hearing that he understood from Mr. Lord the necessity of an expert to his case. *Id.* at 18-19.

Even the prosecution has conceded there was no dispute that Mr. Ceasor "needed an expert to testify that the victim's injuries could have been caused by something other than abuse." Prosecution's Court of Appeals Brief at 18. The prosecution also conceded that there was "no dispute in this case that Defendant's trial counsel recommended an expert witness, and saw the

importance of such a witness to the outcome of the case." *Id.* at 20.

There is also no dispute that trial counsel had found an expert witness, Dr. Faris Bandak, who had reviewed the case materials and who would have testified favorably for the defense. EH 9/21/17 at 92 (trial counsel testifying that "I got Bandak on the line and he's ready to come… He was ready because I'd sent him all the information."); *see also* Court of Appeals Opinion (Appendix A) at 3, 4 (recognizing that Dr. Bandak would have testified favorably for Mr. Ceasor).

Not only was an expert "absolutely" necessary in this case, *Ackley* makes clear that a defense expert is necessary in any contested SBS case like this one. 471 Mich at 389 (concluding that "counsel performed deficiently by failing to investigate and attempt to secure an expert witness who could both testify in support of the defendant's theory that the child's injuries were caused by an accidental fall and prepare counsel to counter the prosecution's expert medical testimony.").[3]

[3] The Court of Appeals not only reached a conclusion plainly at odds with *Ackley*, but the panel also went out of its way to downplay the SBS controversy that *Ackley* had explicitly recognized. The Court of Appeals commented that "[s]ome understanding of the history of SBS" would "help[] to put this matter in context." Court of Appeals Opinion at 3. Then, instead of drawing that history from either *Ackley*, or the published decision in *Yarborough*, both of which accurately summarized the SBS controversy, the Court of Appeals instead quoted at length from a Maryland Court of Special Appeals opinion. *Id.* at 3-4 (quoting *Sissoko v State*, 236 Md App 676, 717-25; 182 A3d 874 (2018)). While both *Ackley* and *Yarborough* recognized the "prominent controversy in the medical community" about the reliability of SBS diagnoses, *Sissoko* downplayed the controversy. Court of Appeals Opinion at 4. It is curious that the Court of Appeals panel ignored published, binding Michigan precedent (indeed, *Yarbrough* is never cited anywhere in the panel's opinion) in favor of foreign authority that conflicts with Michigan precedent.

In fact, *Sissoko* is dubious authority and contradicts authority from other states, including Massachusetts, Texas, Utah, Washington and Wisconsin. *State v Edmunds*, 308 Wis 2d 374, 388; 746 NW2d 590 (2008); *Commonwealth v Millien*, 50 NE3d 808, 826 (Mass 2016); *Commonwealth v Epps*, 53 NE3d 1247, 1264 (Mass 2016); *Ex parte Henderson*, 384 SW3d 833 (Tex Crim App, 2012); *State v Hales*, 152 P3d 321, 342-43 (Utah 2007); *In re Fero*, 367 P3d 588, 598 (Wash 2016). *See also Del Prete v Thompson*, 10 F Supp 3d 907, 957 n.10 (ND Ill 2014) ("[R]ecent developments in this area . . . arguably suggest[] that a claim of shaken baby syndrome is more an article of faith than a proposition of science."); *Cavazos v Smith*, 565 US 1, 13; 132 S Ct 2; 181 L Ed 2d 311 (2011) (Ginsberg, J., dissenting).

**2. *There is no dispute that the only reason counsel did not call an expert was because Mr. Ceasor did not have the necessary funds.***

Trial counsel knew an expert was necessary, EH 9/21/17 at 62, and counsel went to trial without Dr. Bandak's favorable testimony only after Mr. Ceasor told him he would not be able to come up with the funds. Trial counsel, who had been retained by Mr. Ceasor's mother, testified that he was aware "that Mr. Ceasor himself was too poor to have the money" for an expert, and that "he didn't want to put his mother in any further debt." *Id.* at 78. Counsel told the jury repeatedly during voir dire that he was not presenting an expert only because Mr. Ceasor could not afford one. TT 79, 91, 153.

The trial court confirmed after the *Ginther* hearing that Mr. Ceasor's lack of money was the sole reason trial counsel did not retain Dr. Bandak: "Mr. Lord did not quarrel with Defendant's evidence and believed in 2005 Defendant did not have funds of his own to hire an expert." Trial Court Opinion at 12 (Appendix B). The prosecution similarly said in briefing in the Court of Appeals that it had "never questioned" that Mr. Ceasor did not have the money to pay for an expert. Prosecution's Court of Appeals Brief at 24.[4]

It is thus indisputable from the record that, although Mr. Ceasor and his attorney both believed an expert was necessary, no expert was retained because Mr. Ceasor could not afford one.

**3. *There is no dispute that counsel did not request funds from the court because he erroneously believed a person with retained counsel could not do so.***

Although counsel knew an expert was "absolutely" necessary and knew Mr. Ceasor could not afford an expert, counsel did not request funds from the trial court. Mr. Lord's testimony at the

[4] Despite the fact that trial counsel, the trial judge, and the prosecution did not dispute the fact that Mr. Ceasor, a single father with an income of around $17,000, could not afford to retain an expert who would have charged thousands of dollars to testify, the Court of Appeals gratuitously speculated as to whether he really was too indigent to hire an expert. Court of Appeals Opinion (Appendix A) at 9-10. That issue was simply not disputed, and the Court of Appeals erred in reaching out to raise the issue itself.

evidentiary hearing establishes that he knew he could turn to the court for funds to hire an expert witness *when defending a client in a court-appointed case*. EH 9/21/17 at 69-70. However, Mr. Lord neglected to request funds for Mr. Ceasor under his mistaken belief that a defendant with retained counsel could not apply for such funding. EH 9/21/17 at 70.

An indigent defendant whose family pays for him to hire an attorney is still entitled to government funding for essential expert testimony. In 2005, when Mr. Ceasor was tried, MCL 775.15 provided that a court shall make funds available for "any person who is accused of a crime . . . who is poor" in order to secure the appearance of a witness "without whose testimony [the defendant] cannot safely proceed to a trial." As the Court of Appeals held in *Arquette*, "**indigence is to be determined by consideration of the defendant's financial ability, not that of his friends and relatives**." 202 Mich App at 230 (emphasis added). Therefore, *Arquette* held that "[t]he fact that a third party provided funds to retain counsel does not change this indigent defendant's status and, therefore, does not trigger the general policy denying [funding for other litigation costs, in that case being the production of transcripts]." *Id.* at 231.

Accordingly, the fact that Mr. Ceasor's mother paid for his lawyer does not change the fact that he was too poor to afford an expert witness and could, therefore, obtain funds from the trial court under MCL 775.15. Trial counsel's belief to the contrary was wrong under *Arquette*, a case decided 12 years before the trial. The Court of Appeals' characterization of such a request for funding as "novel" is baffling.

**4. *Counsel's failure to request expert funds was therefore deficient performance because it stemmed from an erroneous view of the law regarding the availability of public funding for an expert witness, exactly as in* Hinton v Alabama.**

The record is clear that counsel made a crucial decision—not to present expert testimony in a case where he knew expert testimony was vital—based on a misunderstanding of the legal options available for securing such expert testimony. Counsel's most basic duty was to zealously

advance his client's interest based on an accurate knowledge of the legal options available to the client. Here, counsel knew he needed an expert witness and there was a way to secure such a witness, but his ignorance of the law prevented him from pursuing that possibility. Such conduct was clear deficient performance.

The undisputed record created at the 2017 evidentiary hearing shows that Mr. Lord knew that Mr. Ceasor was relying on his family to pay for his defense. EH 9/21/17 at 78, 101. Mr. Lord failed to secure an expert witness because he fundamentally misunderstood the law on this issue. EH 77-78, 94-95 ("I never thought of filing a motion because . . . honestly, I knew that Mr. Ceasor himself was too poor to have the money, perhaps, but he had indicated he was willing to borrow from his mother and his mother was willing to give it to him."). Again, as noted above, the Court of Appeals had previously held that a defendant's family's potential resources are not relevant to the indigence inquiry. *Arquette,* 202 Mich App at 230.

Under *Hinton,* trial counsel's performance is objectively unreasonable where counsel is not aware of the governing law and fails to file a motion necessary to provide his client an effective defense. 134 S Ct at 1088-89. In *Hinton,* the defendant was charged with a string of robbery-murders. *Id.* at 1083. The crucial piece of evidence connecting the defendant to the crimes was a gun found in his home. *Id.* at 1083-84. Recognizing that the case would turn on expert testimony about the gun, defense counsel asked the court for funding for an expert—but he mistakenly believed that funds were capped at $1,000 when the law actually allowed for "any expenses reasonably incurred." *Id.* at 1084-85. As a result, defense counsel hired an incompetent expert witness whose credibility was destroyed by the prosecution. *Id.* at 1086.

Applying the *Strickland* standard, the U.S. Supreme Court held that "it was unreasonable for Hinton's lawyer to fail to seek additional funds to hire a competent expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped."

*Id.* at 1088. The Court further found that "the only inadequate assistance of counsel here was the inexcusable mistake of law—**the unreasonable failure to understand the resources that state law made available to him**—that caused counsel to employ an expert that he himself deemed inadequate." *Id.* at 1089 (emphasis added).

Importantly, the question of whether or not the trial court would have actually granted funding is irrelevant under *Hinton*. The Supreme Court determined that counsel had been ineffective in failing to **seek** more funds, without any consideration of how a court might have actually ruled on the request. The key point then is that counsel is required to file meritorious motions and cannot simply decline to do so because he guesses that the court would deny them.

Trial counsel's failure to understand and apply governing law in this case—which would make expert funds available for his indigent client, regardless of whether his mother could have taken out more loans to help pay for his defense—constitutes deficient performance under *Hinton*. Exactly as in *Hinton*, trial counsel here knew that his defense was inadequate without an expert, but he did not ask for funds to hire a competent expert because he did not understand that the law allowed him to do so even when his indigent client had retained counsel.

***5. Counsel's failure to secure an expert cannot be blamed on Mr. Ceasor's unsuccessful attempts to raise expert funds.***

The trial court and the Court of Appeals both blamed Mr. Ceasor because he attempted to raise money to pay for an expert, rather than making clear from the very beginning that he could not afford one. The trial court concluded that trial counsel was "in a box" when Mr. Ceasor told him two weeks before trial that he lacked the funds to hire an expert. Trial Court Opinion (Appendix B) at 15. The Court of Appeals also claimed that Mr. Lord was reasonable in his reliance on Mr. Ceasor and had no duty to inform Mr. Ceasor of an alternative method of funding. Court of Appeals Opinion (Appendix A) at 10. Both lower courts were incorrect.

First, there is no basis to conclude that two weeks was too little time to request court funding and have Dr. Bandak testify. On the contrary, Mr. Lord testified that Dr. Bandak had already reviewed the materials and was ready to testify. EH 9/21/17 at 72-73, 92 ("I got [Dr.] Bandak on the line and he's ready to come"), 98. Thus, when Mr. Ceasor informed counsel that his fundraising efforts had failed, counsel could have simply requested expert funding from the court, and the record indicates Dr. Bandak could have been available to testify without delaying the trial. It was thus unreasonable for the trial court and the Court of Appeals to conclude that the timing made it impossible to present an expert at trial.

Second, the trial court and the Court of Appeals ignored the fact Mr. Lord was on notice that Mr. Ceasor was poor throughout the entire representation. *Id.* at 78-81, 101. As Mr. Lord acknowledged during voir dire, it would have been completely unrealistic for Mr. Ceasor to pay an expert up front. TT 153 ("Not everybody has that kind of money available. I can, I can take 25 bucks a week from him for the rest of his life, **but if we want a doctor we got to pay him up front**, you understand that?") (emphasis added). Therefore, news of Mr. Ceasor's inability to raise money for an expert should not have been a surprise to a reasonably competent attorney.

And given that Mr. Lord should have been concerned about Mr. Ceasor's ability to pay for an expert, **it was his responsibility to *inform* Mr. Ceasor of the possibility of requesting funds from the court and to make that request**. Mr. Lord's decision instead to proceed to trial without an expert—when he knew that expert testimony was "extremely critical to the outcome of this case," EH 9/21/17 at 61, fell below an objective standard of reasonableness. *See Tucker v Prelesnik*, 181 F3d 747, 756 (6th Cir 1999) (finding counsel's decision to go to trial unprepared not "within the 'wide range of reasonable professional assistance.'").

Finally, it is irrelevant that Mr. Ceasor told counsel to go to trial without an expert once he concluded he could not raise the funds necessary for an expert. For one thing, regardless of

anything his client said, going to trial without an expert contradicted counsel's own professional judgment. EH 9/21/17 at 62. Further, Mr. Ceasor's statement that he was prepared to go to trial without an expert stemmed not from any "choice" that he made; it stemmed from the cold fact that he did not have the money to pay for an expert and his attorney gave him no other options for paying for an expert. *Id.* at 18, 20. In particular, Mr. Lord never told Mr. Ceasor that he could seek funding from the court to obtain an expert, as Mr. Lord himself did not understand the applicable law allowing him to seek funding even though Mr. Ceasor was a retained client. Thus, Mr. Ceasor was left to believe that going to trial without an expert was his only option, but a competent attorney would have told him of the option to seek funding from the Court.

**6. *The Court of Appeals' conclusion of no deficient performance conflicts with* Ackley, Yarbrough, Arquette *and* Hinton.**

The Court of Appeals concluded there was no deficient performance because it would have been "fairly novel" for a retained lawyer in St. Clair County to ask for funds for an expert, and counsel cannot be expected to make a "novel" argument. Court of Appeals Opinion at 10.

That conclusion conflicts with *Ackley*, *Hinton,* and *Arquette.* It conflicts with *Ackley* because this Court made it clear that in a contested SBS case, the defense lawyer has an obligation to seek and present expert testimony to counter the prosecution case. Having found a qualified expert prepared to provide highly exculpatory testimony for Mr. Ceasor, it was incumbent on trial counsel to take whatever steps he could to actually present that testimony.

The Court of Appeals, however, distinguished *Ackley* as not applying here because trial counsel here researched SBS, consulted an expert (but didn't call him), and challenged the prosecution's SBS evidence via cross-examination and argument. Court of Appeals Opinion at 6-7. Importantly, this contradicts the Sixth Circuit's opinion in this case, which had found counsel's cross-examination to be incomplete and insufficient. *Ceasor*, 665 F App'x at 283. That Sixth

Circuit opinion was cited by three justices of this Court in *Roberts*, 503 Mich 895 (Zahra, J., dissenting), who, despite believing that deficient performance had not been established in *Roberts*, cited to Mr. Ceasor's case as one where it was in fact established.

The Court of Appeals also completely ignored its own binding precedent in holding that cross-examination was an adequate substitute for expert testimony in an SBS case. In *Yarbrough*, the Court of Appeals had held that cross-examination of an expert "steeped in years of medical training, knowledge, and experience" is insufficient as a replacement for a defense expert when a legitimate medical controversy exists. 314 Mich App at 132-33; *see also id.* at 132 (counsel was "incapable of resolving or understanding this critical evidentiary inconsistency without expert assistance."). In Mr. Ceasor's case, counsel himself appeared to understand this—regardless of whatever cross-examination he planned to conduct, counsel knew that an expert was "absolutely" necessary to adequately defend the case. EH 9/21/17 at 62.

Moreover, *Ackley* is concerned mainly with the crucial question of whether counsel presented expert testimony to the jury. 471 Mich at 389 ("counsel performed deficiently by failing to investigate and attempt to secure an expert witness *who could both testify in support of the defendant's theory* that the child's injuries were caused by an accidental fall and prepare counsel to counter the prosecution's expert medical testimony") (emphasis added). The Court of Appeals nullified the core holding of *Ackley* by focusing on counsel's pretrial preparation, cross-examination, and argument, and by glossing over the central question in *Ackley* of whether counsel succeeded in presenting SBS expert testimony to the jury in a contested case where all parties believed a defense expert was warranted.

The Court of Appeals' opinion also conflicts with *Hinton*, which makes clear that it is deficient performance for counsel not to be aware of all of the legal avenues available to obtain expert assistance. After *Arquette*, it should have been clear to trial counsel that he could ask for

expert funding despite the fact that Mr. Ceasor's mother had retained him.

Finally, the Court of Appeals' opinion conflicts with *Arquette* because there was nothing "novel" in 2005, 12 years after *Arquette,* about asking for public funding to pay for litigation expenses necessary for an adequate defense. Competent counsel is required to conduct a reasonable investigation, which would require him to at least research these issues, instead of simply assuming that he could not obtain funds.

**B. The Court Of Appeals Erred In Holding, Contrary To *Hinton v Alabama* And Its Own Published Precedent *Issued The Same Day As This Case*, There Was No Prejudice Because The Trial Court Would Have Denied A Motion For Expert Funds Or Not Allocated Enough Funds To Retain An Expert.**

Contrary to the rulings of the lower courts, the practice of the judges in St. Clair County—as to whether or not they would follow the law in granting funding requests to clients with retained counsel—is entirely irrelevant. *See e.g.* EH 8/7/17 at 24-25 (trial judge stating that a retained defense attorney who asked Judge Adair for funds for an expert would "get laughed out of the courtroom"); Trial Court Opinion (Appendix B) at 13 ("[T]he question is whether trial counsel… was constitutionally ineffective for not filing a motion he believed had no chance of being successful."); Court of Appeals Opinion at 10 (finding no prejudice because trial court might have denied motion or failed to grant sufficient funds to pay Dr. Bandak).

The correct question is not whether the judge would *in fact* have ruled correctly on the motion, but rather whether the motion for funds would have been meritorious. *Tucker*, 181 F3d at 755 (holding the "reasonable jurist" standard governs in determining ineffective assistance of counsel). The "reasonable jurist" standard asks what a reasonable judge hearing a potential motion for funds would have done under these circumstances, not how any particular trial judge would have ruled on a motion. *Id.*

The U.S. Supreme Court's decision in *Hinton* proves the point. The Court granted relief to

Hinton because his attorney should have moved for sufficient funds to hire a competent expert, **but the Court did not require Hinton to make any showing that the trial judge actually would have granted that motion**. It was enough that the motion that should have been made was legally meritorious such that a reasonable judge would have granted it. The practices and preferences of the local Alabama judge who would have decided the motion were not at all relevant.

The Court of Appeals also speculated that even if the motion had been granted, the amount of expert funding generally provided in St. Clair County would not have been adequate to pay an expert. Court of Appeals Opinion at 10 (citing trial counsel's testimony that "$500 customary amount granted by local courts" would not have been enough to afford an expert). But that reasoning also plainly violates *Hinton*. Local practice may have been to provide an inadequate amount of funding, but neither case law nor state statute permitted such a result. The Court of Appeals was not free to decide this appeal based on the assumption that the local court would have provided an inadequate amount of expert funding in violation of Mr. Ceasor's constitutional right to adequate funding.

The Court of Appeals' ruling contradicted another Court of Appeals' opinion released ***on the same day as this case, by the same panel***, regarding funding for an expert defense witness. *People v Williams*, ___ Mich App ___; ____ NW2d ___ (May 23, 2019). In *Williams,* the defense requested $42,650 for an expert witness but only received $2,500 from the court. *Id*. The same panel of judges that heard Mr. Ceasor's case ruled in *Williams* that the trial court failed to explain why $42,650 for a defense witness was too high, and thus that decision was reversed and remanded. *Id*. *Williams* thus conflicts with the notion relied upon by the same panel in Mr. Ceasor's case that a local practice of providing inadequate expert funds can be relied upon to insulate from appellate review a particular decision regarding expert funds.

By concluding that there was no prejudice because the trial court may have denied the

motion for funding or provided inadequate funding, the Court of Appeals failed to grasp that **then Mr. Ceasor would have had a winning argument on appeal for a new trial** (under the same panel's decision in *Williams*, no less). It was incumbent on trial counsel to move for funding for an expert, even if he believed the motion would be denied, because the motion would have been legally meritorious and the denial of that motion would have entitled Mr. Ceasor to appellate relief.

Finally, it should go without saying that the failure to present an expert was prejudicial in that, as in *Ackley*, there was a reasonable probability of a different result had the jury heard from a defense expert. Indeed, the trial judge recognized after the *Ginther* hearing that if he was bound by *Ackley* (which he was, though he erroneously believed he was not[5]), he would probably have to grant a new trial. Trial Court Opinion (Appendix B) at 15.

The trial judge was correct that the absence of a defense expert prejudiced Mr. Ceasor so as to require a new trial under *Ackley*. An expert witness would have pointed out changes in the science surrounding SBS and introduced a very different picture of what caused Brenden's injuries than the sole perspective presented to the jury by the prosecution's expert. "[E]xpert testimony was . . . integral to the [Mr. Ceasor]'s ability to counter [the prosecution's] narrative and supply his own. Had an impartial, scientifically trained expert corroborated [Mr. Ceasor]'s theory, [his]

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[5] The judge believed *Ackley* did not apply because it was decided years after the trial in this case, but that belief was incorrect. First, *Ackley* did not establish new rights; as this Court's analysis makes clear that it was a straightforward application of *Strickland*, which long pre-dates Mr. Ceasor's case trial. *See Ackley*, 497 Mich at 388-98. *Ackley* is therefore routinely cited in SBS-related cases where the trial happened before the June 2015 *Ackley* opinion was released. *See e.g. People v Dimambro*, 318 Mich App 204; 897 NW2d 233 (2016) (2014 conviction); *People v Roberts*, 503 Mich 895; 919 NW2d 275 (2018) (April 2015 conviction).

Second, even if *Ackley* had established new rights, *Ackley* is a constitutional decision, and Mr. Ceasor's case is on direct appeal, meaning that *Ackley* would still apply. *Griffith v Kentucky*, 479 US 314, 322; 107 S Ct 708; 93 L Ed 2d 649 (1987) ("[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."); *People v Sexton*, 458 Mich 43; 580 NW2d 404, 410 (1998) (*Griffith* rule applies to new decisions of Michigan Supreme Court, where the decisions are "mandated by the United States Constitution").

account . . . would not have existed in a vacuum of his own self-interest." *Ackley*, 497 Mich at 397.

This was a close case at trial even without a defense expert. The jury deliberated for parts of three days. On the second day, the jury asked to hear the State SBS expert's entire testimony again, and then they asked to hear parts of it again the next day. TT 650-51, 738. Even after hearing parts of the prosecution expert's testimony three times, the jury initially indicated it could not reach a unanimous verdict. TT 765.

Given the evident closeness of this case, a defense expert would clearly have been material. Mr. Ceasor attached to his Motion for New Trial the affidavits of four renowned experts who would have testified in 2005 at Mr. Ceasor's trial, just as Dr. Bandak would have, that the theory of SBS presented by the prosecution's expert was incorrect and that Brenden's injuries were fully consistent with the short, accidental fall from the couch that Mr. Ceasor described. Those four affidavits, which Mr. Ceasor first presented to the trial court in support of his 2010 Motion for Relief from Judgment, are attached to this Application as Appendix C. The trial court accepted the affidavits on their face, and indicated that it did not need to hear testimony from the affiants. EH 8/7/17 at 23, 28-29.

Dr. Bandak or another expert witness could have informed the jury of evidence undermining the theory of SBS presented by Dr. Gilmer-Hill at trial. By the time of trial in 2005, it was generally recognized that serious and even fatal head injuries in children—including subdural hematomas and retinal hemorrhages far more severe than the ones suffered by Brenden Genna in this case—can be caused by short falls exactly like the short fall that Mr. Ceasor described. Plunkett Affidavit at 12; Stephens Affidavit at 3 (both in Appendix C). But without an expert to offer this perspective, trial counsel was limited to his feeble cross-exam attempts, and no alternate, medically sound theory in Mr. Ceasor's favor was advanced. *See Ceasor*, 655 Fed App'x at 283 (CA 6 2016) (Sixth Circuit determining that because trial counsel failed to obtain an expert,

he "lacked the ability to refute Dr. Gilmer-Hill's allegedly erroneous assertions about causation, the biomechanics of short falls, and the etiology of Brenden's subdural hematoma and retinal hemorrhaging.").

The prosecution's expert, Dr. Gilmer-Hill, testified at trial that retinal hemorrhage combined with a subdural hematoma is diagnostic for child abuse. TT 435-36. But this SBS theory had been challenged as far back as 1987 by Dr. Ann-Christine Duhaime, a neurosurgeon who worked with biomechanical engineers to replicate the effects of shaking. Plunkett Affidavit at 12 (Appendix C). Dr. Duhaime and her colleagues concluded that "severe head injuries commonly diagnosed as shaking injuries require impact to occur and that shaking alone in an otherwise normal baby is unlikely to cause the shaken baby syndrome." Duhaime et al, *The Shaken Baby Syndrome: A Clinical, Pathological and Biomechanical Study*, J. NEUROSURG. 66:409 (1987); *see also* Van Ee Affidavit at 6 (Appendix C).

In 2001, Dr. Plunkett published a highly influential paper, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 4 AM. J. FOR. MED. PATH 24, which concluded that children falling from a height of only three feet could suffer retinal hemorrhage, subdural hematoma, and fatal injury. Plunkett Affidavit at 12-13. His reported cases included a videotaped short fall that produced findings identical to those in allegedly shaken children. *Id.* At that time, many doctors were testifying that only falls from a height of 20 to 30 feet could cause these types of injuries, exactly as Dr. Gilmer-Hill testified in this case. TT 479-80.

In 2005, Dr. Faris Bandak, the same expert trial counsel attempted to retain in this case, published an article further concluding that manual shaking of the type hypothesized in SBS theory would cause severe neck and spinal injuries (which are not present in this case) long before causing intracranial injury like subdural hematomas. F. Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, FOR. SCI. INT'L 151:71-79 (2005); Plunkett Affidavit at 12-13.

Accordingly, it is unlikely (or even impossible) that a subdural hemorrhage unaccompanied by corresponding neck or spinal injury is attributable to bridging vein rupture caused by manual shaking. Uscinski Affidavit at 5 (Appendix C).

Dr. Gilmer-Hill testified for the prosecution at Mr. Ceasor's trial that retinal hemorrhage is diagnostic for child abuse. TT 452-53. This is simply contrary to the medical literature, which establishes that retinal hemorrhaging is the product of increased intracranial pressure as seen, for example, in brain swelling and a variety of natural causes. Stephens Affidavit (Appendix C) at 4. One of the most common known causes for retinal hemorrhages is impact, including short falls, such as the videotaped one in Plunkett's study. *Id.* at 8; Plunkett Affidavit at 12-13.

The presence of retinal hemorrhage and subdural hematoma together is also not diagnostic for intentional injury, contrary to what Dr. Gilmer-Hill testified to at the trial. The accelerations produced from even a short fall can be much greater than those produced from shaking and are thus more likely to cause these injuries. Van Ee Affidavit at 6; Stephens Affidavit at 3.

Further, the injuries Brenden suffered are consistent with the history given by Mr. Ceasor of a short fall off of the sofa. Van Ee Affidavit at 2, 5, 8, 11. At trial, Dr. Gilmer-Hill supported her testimony to the contrary by citing the study discussed above by Dr. Ann-Christine Duhaime at the University of Pennsylvania. TT 479-80. Dr. Gilmer-Hill claimed that Duhaime's study proves that a shaking incident has much more force than even a five-to-six-foot fall. *Id.* **But the opposite is true.** Dr. Duhaime specifically concluded both that head injuries typically diagnosed as shaking injuries do require impact to occur and that the magnitude of angular deceleration from impact is 50 times greater than from shaking. Plunkett Affidavit at 12.

These findings are consistent with other studies that found that brain injuries consistent with those attributed to shaking can arise from short falls. Dr. Irving Root's 1992 study indicated that short falls can produce the same results as long falls. Irving Root, *Head Injuries from Short*

*Distance Falls*, AM. JOURNAL FOR. MED. PATH., 13(1): 85-87 (1992); Plunkett Affidavit at 12. A 1993 study by Dr. Gregory Reiber concluded that children can suffer from brain swelling from a two-to-three-foot fall. Gregory Reiber, *Fatal Falls in Childhood: How Far Must Children Fall to Sustain Fatal Head Injury?*, AM. JOURNAL FOR. MED. PATH., 14(3): 201-207 (1993); Plunkett Affidavit at 12. Dr. Gilmer-Hill was unfamiliar with the Root and Reiber studies. TT 483.

Dr. Gilmer-Hill also misunderstood the neurosurgical literature on which she focused. In fact, articles in the Journal of Neurosurgery, including the 1987 Duhaime study, have repeatedly shown that shaking does not produce sufficient force to rupture bridging veins and that shaking a baby with maximal exertion produces head accelerations less than those produced in a one-foot fall onto carpet. Uscinski Affidavit at 7, 10. While Dr. Gilmer-Hill testified that Dr. Plunkett's 2001 study was not accepted in the medical community, the videotape in case study #5 is indisputable evidence of the types of injuries that can result from a short fall. Van Ee Affidavit at 4, 10. Unlike the child in the videotape, who died, Brenden's medical records confirm that his injuries were limited to a Grade III concussion with short-term loss of consciousness followed by full recovery within an hour or so of the incident. Concussions of this nature are consistent with the accidental fall that Mr. Ceasor described. Plunkett Affidavit at 14; Stephens Affidavit at 11.

Not only were Brenden's injuries consistent with a short fall; they were inconsistent with shaking. The complete absence of torso and neck injuries to Brenden is significant because violent shaking of a baby by gripping and shaking the chest would result in extensive torso and neck injuries. Van Ee Affidavit at 7. Shaking a 27-pound, 16-month-old child like Brenden sufficiently to rupture a bridging vein would require even greater force and would also be expected to result in bruising and other injuries. Since Brenden had no significant external injury to the head or body, any trauma that did occur was entirely consistent with a simple fall off a couch, as described by Mr. Ceasor. Van Ee Affidavit at 8. As for the supposed lack of bruising consistent with the fall

Mr. Ceasor described, Cheryl Genna *did* see a red mark roughly two inches long on Brenden's head after he was taken to Children's Hospital. TT 232-33. The Children's Hospital progress notes and diagram also documented bruising to Brenden's forehead. TT at 471-72.

In short, had Mr. Ceasor's trial counsel consulted and retained an expert, the jury would have known that much of the Dr. Gilmer-Hill's testimony was incorrect and that Brenden's symptoms were in fact fully consistent with the short, accidental fall off of the couch described by Mr. Ceasor. Given this Court's guidance regarding prejudice in *Ackley* and the closeness of the case at trial, it is clear that, had a defense expert testified at trial, there is a reasonable probability of a different outcome. Mr. Ceasor has therefore satisfied the prejudice prong of *Strickland* in addition to the performance prong.

## CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant-Appellant Terry Ceasor respectfully requests that this Court grant this application for leave to appeal or summarily reverse the decision of the Court of Appeals and remand this case for a new trial.

Respectfully Submitted,

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**Dated: July 17, 2019**